IN THE

United States Supreme Court

October Term, 1964

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*,
v.
CALE J. HOLDER, United States District Judge for the Southern District of Indiana,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for The Seventh Circuit

BRIEF FOR RESPONDENT

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MISCELLANEOUS

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---

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at (R. 70-81) 321 F. (2d) 43. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1963 (R. 84). Robert L. Schlagenhauf filed a petition for certiorari on October 18, 1963, and the same was granted on January 13, 1964 (R. 85, 84 U. S. 516).

The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

FEDERAL RULES INVOLVED

Although the Petitioner has asserted that there are several constitutional provisions, Federal statutes and Federal rules involved, this case involves only the interpretation of Rule 35(a) Federal Rules of Civil Procedure. This rule provides:

> "(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the Court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, condition and scope of the examination and the person or persons by whom it is to be made."

QUESTIONS PRESENTED

This action arose when the Petitioner drove a Greyhound bus loaded with passengers into the rear of a tractor-trailer while both vehicles were moving along a four-lane divided highway. The tractor involved was owned by Contract Carriers, Inc. and driven by Joseph L. McCorkhill. The trailer was owned by National Lead Company. Each of these three parties, along with Greyhound Corporation, and the Petitioner were named as party defendants in a personal injury action brought by several bus passengers. In taking pretrial-discovery depositions, it was ascertained that Petitioner had been involved in a similar type accident near the town of Flatrock, Michigan, while driving a bus for Greyhound Corpora-

tion; that the lights on the tractor-trailer struck by Petitioner were visible from three-fourths to one-half mile to the rear; and that Petitioner himself saw red lights ahead of him for a period of ten to fifteen seconds prior to the impact, yet did not reduce speed or alter his course.

Seeking to find the reason for this tragic accident, the defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company filed a petition for a physical and mental examination of Petitioner. This petition sought an examination by a specialist in the field of opthalmology, neurology, psychiatry and internal medicine. The district court entered an order on February 21, 1963 ordering an examination by two opthalmologists, two internists, two psychiatrists, and three neurologists.

Subsequent to the granting of the motion under Rule 35(a), the defendants, Contract Carriers, Inc.; Joseph L. McCorkhill; and National Lead Company filed a supplemental petition on March 14, 1963, with Contract Carriers, Inc. and Joseph L. McCorkhill alleging that the physical and mental condition of Petitioner was in controversy by reason of their answer in general denial to Greyhound Corporation's cross complaint, and National Lead Company alleging that his physical and mental condition was in controversy by reason of its cross complaint filed against Petitioner. The district court granted the supplemental petition on March 15, 1963.

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the district court to vacate its order of February 21, 1963 and March 15, 1963.

The Court of Appeals denied the petition and in so doing held that insofar as Contract Carriers, Inc. and Joseph L. McCorkhill were concerned Petitioner was not a

party within the meaning of Rule 35(a); but insofar as National Lead was concerned he was.

Subsequent to this decision and before any application was made to this Court; the district court, upon petition filed by National Lead Company, vacated its previous order and ordered petitioner to submit to a total of four examinations—one in each field of specialty requested. The questions therefore presented are:

1. Should this Court review a denial of the extraordinary remedy of mandamus under the facts here asserted?

2. Was the petitioner, Robert L. Schlagenhauf, a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure?

3. Was there justification under the pleadings and uncontradicted affidavit evidence for the exercise of the Respondent's discretion in granting the order?

4. Did the Respondent in any manner abuse his discretionary power in ordering multiple expert examinations under the facts shown here?

STATEMENT

The action arose out of a motor vehicle accident which occurred on July 13, 1962. (R. 16) On July 17, 1962 an action was commenced when Edward Markiewicz, John Anthony Markiewicz and Jennie Markiewicz filed a complaint in three paragraphs against the Greyhound Corporation, a common carrier; Robert L. Schlagenhauf, Greyhound's driver; Contract Carriers, Inc.; and Joseph L. McCorkhill, Contract Carriers' driver. On November 8,

1962 an amended complaint was filed naming National Lead Company as an additional party-defendant. (R. 15-24) The amended complaint alleges that the accident occurred on U. S. 40, which is a four-lane highway with two lanes for east bound traffic and two lanes for west bound traffic. John and Jennie Markiewicz were paying passengers on the Greyhound bus which was traveling east and which bus ran into the rear of a trailer being pulled by Contract Carriers' tractor, which was also traveling east. John and Jennie Markiewicz received personal injuries, and the complaint seeks $1,000,000.00 compensatory damages and $300,000.00 exemplary damages for John Markiewicz's personal injuries; $30,000.00 compensatory damages and $50,000.00 exemplary damages for Jennie Markiewicz's personal injuries; and $250,000.00 compensatory damages for the loss of services of John and Jennie Markiewicz, by Edward Markiewicz, father and husband, respectively, of the two injured bus passengers. (R. 15-24)

The defendant Greyhound filed its answer to the complaints and filed a counter-claim against Contract Carriers and Joseph L. McCorkhill, its driver; National Lead, owner of the trailer which was being pulled by Contract Carriers; and General Motor Corporation, a third-party defendant. The counter-claim filed by Greyhound seeks to recover for the damage to the front of the bus, caused when Mr. Schlagenhauf drove the bus into the rear of the trailer owned by National Lead Company and pulled by Contract Carriers, Inc. (R. 24-34)

The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, filed their answer in general denial to the amended complaint. (R. 43-44) The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, filed an answer in three paragraphs to Greyhound's counter-claim, the

first paragraph in general denial; the second paragraph alleging that the negligence of the defendant, Robert L. Schlagenhauf, in operating the bus was the proximate and contributing cause of the damage; the third paragraph alleging that the defendant, Robert L. Schlagenhauf, was guilty of wilful and wanton misconduct which proximately caused the damage to Greyhound's bus. (R. 34-37)

Contract carriers and Joseph L. McCorkhill filed a letter with the Court pursuant to the Respondent's pre-trial order, setting forth the specific allegations relied upon in defense of the counter-claim. (R. 38-40) Among these allegations were:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to the Greyhound Corporation." (R. 40)

The defendant, National Lead, filed its answer to the amended complaint in general denial. (R. 46-47) National Lead filed its answer to Greyhound's counter-claim, the first paragraph in general denial, and also filed a counter-claim against Greyhound and Robert L. Schlagenhauf. (R. 49-53) The counter-claim alleged, among other things, *that Robert L. Schlagenhauf was operating the bus when he knew, or should have known, that his vision was impaired.* (R. 52)

On February 5, 1963 Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, filed a petition seeking to require the defendant, Robert L. Schlagenhauf,

the bus driver, to submit to a series of physical examinations in an effort to find the true reason and explanation for this accident. (R. 7-10) Said petition gave the following reasons for such examination:

> "(1) The Defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motor-bus for the defendant, Greyhound Corporation. (R. 9)
>
> (2) The lights of the tractor-trailer unit, which was struck by the bus driven by the Defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle. (R. 9)
>
> (3) The Defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course." (R. 9)

The petition further showed that examinations by multiple experts were required because no one doctor could examine the Defendant Schlagenhauf respective to all of the conditions which related to his driving ability. Further, the petition showed the Court that without such examinations, the Defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company would be without means to present evidence on this issue and would be unable to properly present their defense. (R. 7-10)

The District Court on February 21, 1962 ordered the Defendant, Mr. Schlagenhauf, to submit to physical and mental examinations by two named interists, two named ophthalmologists, three named neurologists and two named psychiatrists. (R. 5-6)

On March 14, 1963 Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, filed a supplemental petition for a physical examination of Mr. Schlagenhauf. The supplemental petition of Contract Carriers and Joseph L. McCorkhill alleged that such examinations are necessary as the physical and mental condition of Mr. Schlagenhauf is in issue by virtue of the answer of general denial to Greyhound's cross-complaint. (R. 55-59)

The supplemental petition of National Lead Company, alleged that the physical and mental condition of Mr. Schlagenhauf is an issue under the cross complaint filed by National Lead Company against Greyhound and Robert Schlagenhauf. (R. 64-67)

The district court issued an order on March 15, 1963 granting Contract Carriers, Inc.'s, Joseph L. McCorkhill's and National Lead Company's prayer for physical and mental examinations of Mr. Schlagenhauf. (R. 62-63—68-70)

The Petitioner then applied to the Court of Appeals for the Seventh Circuit for a Writ of Mandamus requiring the Respondent to vacate his orders of February 21, 1963 and of March 15, 1963. (R. 1)

The Court of Appeals refused to issue the writ. (R. 70)

Subsequent to the decision of the Court of Appeals, the Respondent vacated the order which was the subject of that Court's decision, and ordered the Petitioner to submit to one examination in each of four areas of medical specialty. (A. 10-A. 11)

ARGUMENT

I

THE PETITIONER HAS FAILED TO SHOW SUFFICIENT FACTS TO WARRANT THE EXTRAORDINARY WRIT OF MANDAMUS

This court has previously held that there are no constitutional prohibitions to Rule 35, Federal Rules of Civil Procedure. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Rule 35 being within the power of this Court to promulgate, then it must follow that it was within the power of the Respondent to apply.

The rule itself is clear. It applies to a party. It does not contain any language limiting its application to a party-plaintiff, but applies to parties generally. To argue that Robert L. Schlagenhauf is not a party ignores the obvious. He was the individual who drove the bus into the rear of a tractor-trailer while both vehicles were moving along a four-lane highway. He is a named party in the initial action filed. He is a named party-defendant to the cross-complaint filed by National Lead Company. It is alleged in the letter filed by Contract Carriers, Inc. and Joseph L. McCorkhill pursuant to Respondent's pretrial order that the sole proximate cause of the accident was the negligence of Robert L. Schlagenhauf in operating the bus while physically and mentally sick.

The power to order a party to submit to a physical examination being unquestioned, and the fact that Petitioner is a party being likewise unquestioned, the question

narrows to whether this Court will resort to the extraordinary writ of mandamus to supervise the trial court's exercise of its discretionary power.

This Court has announced its intention to avoid interferring with the discretionary powers of the trial court.

In *Ex Parte Fahey* (1947), 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041, this Court held:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes."

In *Fisher v. Delehart* (C.C.A. 8th, 1959), 250 F. (2d) 265, the Court held:

> "We have studiously refrained from using mandamus to tell a judge what decision he must make in the exercise of a jurisdiction and discretion entrusted to him by law."

In *Belships Co. Ltd., Skibs A/S v. The Republic of France* (C.C.A. 2d 1950), 184 F. (2d) 119, the Court held:

> "While we have authority to issue one of the extraordinary writs prayed for in aid of our appellate jurisdiction, we have been admonished that this should be done only when necessary in extraordinary cases, and not as a means of interlocutory appeal."

The Petitioner has not shown any extraordinary cause for mandamus. He has not demonstrated wherein the Respondent has enlarged or nullified the Rules of Civil Procedure. The only reason for mandamus advanced by Petitioner is his personal inconvenience. To permit the extraordinary remedy of mandamus to issue opens the door for litigants to challenge discovery orders and to gain appellate supervision over trial judges operating in their discretionary sphere. Such has not been the policy of this Court. The order in this case, like similar discovery orders constantly being entered by trial courts, sought to uncover only the true facts. What harm does this cause Petitioner? To paraphrase the language of the Court of Appeals in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2: if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted.

II

THE PETITIONER, ROBERT L. SCHLAGENHAUF, IS A PARTY WHOSE MENTAL AND PHYSICAL CONDITION IS IN CONTROVERSY WITHIN THE MEANING OF RULE 35

The Court of Appeals' opinion is based upon this Court's pronouncements that there are no constitutional prohibitions against ordering a party to submit to a physical or mental examination. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Initially, this Court held that the Federal Court did not have inherent power to order a party to submit to a

physical or mental examination. *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734.

In *Camden & Suburban Ry. v. Stetson* (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, this Court recognized that if state statutory authority existed the Federal Court sitting therein could also order a physical or mental examination.

Both *Botsford* and *Stetson* were considered by the Advisory Committee on Rules (see notes of Advisory Committee on Rules following Rule 35 U.S.C.A.) and the rule was written to fill the gap that existed between *Botsford* and *Stetson*.

Following the adoption of the rule, the District Court for the Western District of Missouri in *Wadlow v. Humberd* (D.C. W.D. Mo. 1939), 27 F. Supp. 210, 1 F. R. Serv. 35a.21, Case 1, narrowly interpreted Rule 35 in holding that it applied only to personal injury cases, and when the physical and mental condition was "immediately and directly" in controversy.

This narrow construction was seriously criticized by text writers and was disapproved in *Beach v. Beach* (App. D. C. 1940), 114 F. (2d) 479, 3 F. R. Serv. 35a.5, Case 2, wherein the Court in order to achieve justice applied the rule in an action by a wife for maintenance of a child where there was a counterclaim based upon adultery and a denial of paternity; the Court holding that the child was a "party" for the purpose of the physical examination rule.

In the Chinese naturalization cases of which *Lue Chow Ken v. Brownell* (C.C.A. 2d 1955), 220 F. (2d) 187, 21 F. R. Serv. 35a.21, Case 1, is representative, the Courts

have permitted blood tests to be taken of parties in order to prove or disprove paternity and citizenship.

Also, in *Countee v. U. S.* (C.C.A. 7th 1940), 112 F. (2d) 442, 3 F. R. Serv. 35a.5, Case 1, the Court authorized a physical examination in a case involving an action on a war risk policy.

In all of these situations, the physical condition of the party being examined was not "immediately and directly" in controversy which is the position of the Petitioner. The physical condition was in controversy, however, and the establishment of the facts was necessary to obtain a just result.

Petitioner's argument that Rule 35 can only be applied to a plaintiff or to other parties who voluntarily resort to the Federal Court for relief and thereby waive a portion of their rights, does not meet the test of logic. What rule shall govern in a case commenced in state court and which is removed to a federal court by the defendant? In this situation the Petitioner's position would require that insofar as the plaintiff is concerned *Botsford* or *Stetson* would govern, but insofar as the defendant is concerned Rule 35 would be applicable. Obviously, the act of using a federal court as a forum is an irrelevancy in applying the rule. If waiver is the rationale, then *Sibbach* becomes irrelevant because this court would then be recognizing that the rule treats of substantive rights and not procedure.

Rule 35 was adopted to enable parties to litigation to ascertain the true facts concerning the mental or physical condition of any other party if basically in controversy. The policy of the rule is to compel full disclosure of the facts concerning any party's physical or mental condition so that nothing is hidden from the fact finder. The language of the rule is clear and unambiguous. It does not

limit its application, as the Petitioner would suggest, to a "party-plaintiff" or a party voluntarily resorting to federal courts, but the rule applies to a "party." The rule does not require the physical or mental condition to be specifically "in issue," but it suffices if it is "in controversy."

III

THERE WAS JUSTIFICATION UNDER THE PLEADINGS AND UNCONTRADICTED AFFIDAVIT EVIDENCE TO JUSTIFY THE RESPONDENT'S EXERCISE OF DISCRETION IN ORDERING THE PETITIONER EXAMINED

Thus far the Courts have consistently held that the granting of a motion for a physical examination of a party is within the discretion of the trial court.

Bucker v. Krause (C. A. Ill. 1953), 200 F. (2d) 576, cert. den., 345 U. S. 997, 73 S. Ct. 1141, 97 L. Ed. 1404, rehearing denied, 346 U. S. 842, 74 S. Ct. 17, 98 L. Ed. 362;

Teche Lines v. Boyette (C.C.A. Miss. 1940), 111 F. (2d) 579.

The Courts of Appeal have consistently refrained from interferring with the trial court's discretion.

Fisher v. Delehart (C.C.A. 8th 1959), 250 F. (2d) 265.

The Respondent in the instant case did not abuse his discretion. The facts before the Court showed that the Petitioner drove a bus load of passengers into the rear of a tractor-trailer moving in the same direction as the

bus. The accident occurred on a four-lane highway. Discovery depositions were taken and it developed that the Petitioner had been involved in a similar accident on a previous occasion; that the Petitioner saw red lights ahead of him for 10 to 15 seconds prior to the collision, yet did not reduce the speed or alter his course; and that the lights on the rear of the tractor-trailer were visible for one-half to three-fourths of a mile. In addition to these facts being a part of the record in the case, an affidavit was attached to the petition again setting them out in detail. The motion and the affidavit were filed on February 5, 1963 and were pending in the Court for 16 days before the Respondent acted. At no time did the Petitioner file any counter-affidavits contesting the facts which were before the trial court. Surely, the Petitioner should be required to submit at least counter-affidavits before he attacks, by seeking an extraordinary writ, the exercise of discretionary power by the trial court.

Not only was good cause shown but the physical and mental condition of the Petitioner was in controversy. It was in controversy under the pleading allegations of National Lead Company's cross-complaint. His physical and mental condition was in controversy under the letter filed by Contract Carriers, Inc. and Joseph L. McCorkhill pursuant to Respondent's pretrial order, which letter specifically stated that the sole proximate cause of the accident was Petitioner driving the bus while being physically and mentally impaired. Such allegations certainly place the Petitioner's physical and mental condition in controversy.

Petitioner has argued throughout this case that there must be specific pleading allegations concerning his physical or mental condition. This is not true. The rule requires his physical or mental condition to be in controversy, not

in issue. It is not incumbent for the co-defendants to plead other than a general denial to show that Petitioner's actions were the sole proximate cause of the accident.

Regardless of whether the ultimate controversy is paternity, citizenship or sole proximate cause of an accident, Rule 35 is broad enough as a tool to aid in ascertaining the true facts in order that a just result can be obtained.

IV

THE RESPONDENT DID NOT ABUSE HIS DISCRETIONARY POWER IN ORDERING MULTIPLE EXAMINATIONS

The Petitioner has devoted a substantial portion of his brief to arguing that the ordering of nine physical examinations was an abuse of discretion The Petitioner is well aware of the fact that the Respondent has corrected this initial order and that he is required to submit to one examination in four areas of medical specialty.

Respondent acknowledges that initially the order entered required Petitioner to submit to physical and mental examinations by two internists, two opthalmologists, two psychiatrists, and three neurologists. Without seeking to have the order amended or corrected, the Petitioner applied for and obtained a stay of proceedings pending the decision on his petition for a Writ of Mandamus. Following the denial of this Writ by the Court of Appeals, the Petitioner still did not seek to have the number of examinations reduced to that prayed for in the petition. The co-defendant, National Lead Company, did however call the Respondent's attention to the number of examinations and the Respondent reduced the number to one in

each of the four recognized areas of medical specialty. This action of the Respondent was done only after the temporary stay order was dissolved by the Court of Appeals and before Petitioner had requested certiorari.

It seems that this court should not review an order that does not exist. It would further appear that the Petitioner should have brought this point out in his brief so that this court would be fully apprised of the facts as they exist.

Respondent would further show the Court that the additional part of the record showing these proceedings was made a part of the record on the petition for certiorari but the Clerk would not print these proceedings with the record. These proceedings are, however, included in this brief as an appendix.

It is not an abuse of discretion for the Respondent to order Petitioner to be examined in different recognized specialties having relevance to the possible physical and mental aberrations which could have been present and affected his ability to see or appreciate dangers. In today's complex society, it is certainly not an abuse of discretion to order examinations in various areas of medical specialty in the search for the truth. That the Court is not limited to ordering one examination is clearly stated in 2A Barron and Holtzoff, Federal Practice & Procedures, Sec. 822, P. 483 (1961):

> "• • • Such a limitation is wholly inconsistent with the realities of modern medical practice, where specialists from various branches of medicine are required. There is nothing in the rule to prevent the Court from ordering examinations by all of them."

This Court should not invoke the extraordinary remedy of mandamus to review the exercise of the trial court's

discretion in its search for truth. An examination in four recognized fields of medical specialty certainly is not an abuse of discretion, particularly under the pleadings and uncontradicted affidavit evidence.

V

RESPONDENT'S ORDER DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

Either Rule 35 has constitutional limitations or it does not. This Court has held that it does not. *Sibbach v. Wilson & Co., Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422, 82 L. Ed. 479.

Union Pacific Ry. v. Botsford (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734, held that there was no inherent power in the Federal Court to order a physical or mental examination of a party; and that without statutory authority the Federal Court could not order such examination.

Camden & Suburban Ry. v. Stetson (1900), 177 U. S. 172, 20 S. Ct. 614, 44 L. Ed. 721, held that if there was state statutory authority for such examination, then a Federal Court sitting in that state could order an examination.

Obviously, if there is a constitutional prohibition against such examination neither a federal nor a state statute could abridge such prohibition. To find a constitutional infringement here would, of necessity, require overruling *Botsford*, *Stetson* and *Sibbach*.

Further, if a constitutional prohibition is present, then Rule 35 must be completely unconstitutional as a party plaintiff in a personal injury action would have the same protection as Petitioner. It would be a novelty in American jurisprudence to hold that one party to litigation has constitutional protection and another has not. It would also

be a novelty to hold that a party-plaintiff in a personal injury action waives constitutional protection by seeking relief in a Federal Court.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

ERLE A. KIGHTLINGER,

HOWARD J. DE TRUDE, JR.,

ARIBERT L. YOUNG,
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111 Monument Circle,
Indianapolis, Indiana,

KEITH C. REESE,
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Indianapolis, Indiana,

Counsel for Respondent.

INDEX To APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right, *Plaintiffs,* v. THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., *Defendants.* and NATIONAL LEAD COMPANY, *Third Party Defendant.*	No. IP 62-C-285

PETITION TO AMEND COURT ORDER AND TO ORDER DEFENDANT, ROBERT L. SCHLAGENHAUF, EXAMINED PHYSICALLY

The defendant, National Lead Company, prays that this Court modify its order heretofore entered on March 15, 1963 ordering the defendant Robert L. Schlagenhauf, examined by nine (9) physicians, said previous order of the Court being in the words and figures as follows:

(H.I.)

the defendant, National Lead Company, prays that the Court modify this order to require said defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians:

Dr. L. Leo Loughlin, M.D.	Dr. A. Ebner Blatt, M.D.
Dr. Karl L. Manders, M.D.	Dr. Jack I. Taube, M.D.

This Court has heretofore ordered that counsel for defendant, National Lead Company, and counsel for defendant, Robert L. Schlagenhauf, and the Greyhound Corporation, to agree as to dates and times for said physical examinations; it was impossible to agree on specific dates and the defendant, National Lead Company further prays that the Court order said defendant, Robert L. Schlagenhauf to be examined by the four (4) said doctors on the dates and times as follows:

Dr. L. Leo Loughlin, M.D. Phychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. Neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube Opthalmologist 11:00 A.M. 10/10/63

The Petitioner further shows the Court that certain appointments have been made and that on September 6, 1963, the attorneys for Robert L. Schlagenhauf were advised of said times and dates; per copy of a letter which is attached hereto, and marked Exhibit "A"; but that attorneys for Schlagenhauf have advised that said appointments cannot be kept by Schlagenhauf.

WHEREFORE, Petitioner prays that this petition and all things herein contained be sustained.

Rocap, Rocap, Reese & Robb,

By Keith C. Reese,
Attorneys for Defendant,
National Lead Company.

156 E. Market Street,
Indianapolis, Indiana,
MElrose 8-7547.

EXHIBIT "A"

September 6, 1963

Smith & Yarling
Attorneys at Law
1313 First Federal Building
13 N. Pennsylvania Street
Indianapolis, Indiana

Re: John Anthony Markiewicz, bnf
Edward Markiewicz, et al.
v.
The Greyhound Corporation
Robert L. Schlagenhauf
Joseph L. McCorkhill
Contract Carriers, Inc. and
National Lead Company
Cause No. IP 62-C-285

Attention: Mr. Richard Yarling

Dear Dick:

Confirming our several conferences concerning physical examination of Robert L. Schlagenhauf, we wish to ad-

vise that we have made the following appointments with the following doctors:

Dr. L. Leo Loughlin, M.D. psychiatrist 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt Internist 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. neurologist 8:30 A.M. 10/7/63	Dr. Jack I. Taube Opthalmologist 11:00 A.M. 10/10/63

These doctors have advised that if the reserved time is not used by Mr. Schlagenhauf, and no other patient uses the time, that they will charge for said allotted time. We wish to advise you that if Mr. Schlagenhauf cannot keep these appointments, and there is any charge we will expect Mr. Schlagenhauf to pay same.

We are attempting to arrange other physical examinations as ordered by the Court, and will advise you when this has been accomplished.

Yours very truly,

Rocap, Rocap, Reese & Robb,
Keith C. Reese,

KCR:as
cc Mr. A. L. Young
Armstrong, Gause, Hudson & Kightlinger, attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of said Petition has been sent this 14 day of September, 1963 to Smith & Yarling, 13 North Pennsylvania Street, Indianapolis, Indiana, Townsend and Townsend, Indiana Building, Indianapolis, Indiana, Edmund Pawelec, Western Saving Fund Building,

Philadelphia, Pennsylvania, Locke, Reynolds, Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, Sheldon Breskow, Lemcke Building, Indianapolis, Indiana, Lewis, Weiland, Payne and Carvey, Monument Circle, Indianapolis, Indiana by posting it in the United States Mail.

Rocap, Rocap, Reese & Robb,
By Keith C. Reese

Rocap, Rocap, Reese & Robb
156 East Market Street.
Indianapolis, Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiff,

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., NATIONAL LEAD COMPANY,

Defendants.

No. IP 62-C-285

OBJECTIONS AND BRIEF OF DEFENDANT ROBERT L. SCHLAGENHAUF IN OPPOSITION TO PETITION TO ORDER PHYSICAL AND MENTAL EXAMINATIONS

The defendant Robert L. Schlagenhauf respectfully submits the following brief in opposition to the petition filed by defendant National Lead Company herein on September 16, 1963 to order this defendant to submit to physical and mental examinations by the four physicians named in the said petition, to-wit: Dr. L. Leo Loughlin, psychiatrist; Dr. Karl L. Manders, neurologist; Dr. A. Ebner Blatt, internist; and Dr. Jack I. Taube, opthalmologist:

This defendant has hereinbefore filed his brief in opposition to the original petitions of defendant National Lead Company and defendant Contract Carriers, Inc. for such examinations, asserting that the physical and mental condition of the defendant Robert L. Schlagenhauf is not "in controversy" herein in the sense that these words are used in Rule 35 of the Federal Rules of Civil Procedure; that good cause has not been shown for the multiple examinations prayed for by the cross-defendant; and that the ordering of such examinations, including mental examination, of a defendant driver is wholly unprecedented and beyond the authority extended by Rule 35. A review of the points and authorities set forth in the said original brief is respectfully requested. In addition to the quotation from *Union Pacific R. Co. v. Botsford* (1891), 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 previously set forth that:

251 "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of

> his own person, free from all restraint or interference of others, unless by clear and unequestionable authority of law * * * ."

the attention of the Court is respectfully called to the quotation respecting the requirement of the showing of good cause under Rule 35 as set forth in *Guilford National Bank of Greensboro v. Southern Ry. Co.* (4th Cir. 1962), 297 F. (2d) 921:

> 924 "There appear to be adequate policy reasons for imposing the good cause requirement of Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

In opposition to the requirement of any examinations at all, much less four examinations including mental examination, this defendant asserts again that good cause has not been shown for such examinations, and no such cause is alleged or supplemented in the petition filed on September 16, 1963 by defendant National Lead Company. It is further respectfully pointed out to the Court that no hearing has been held to inquire into the existence of good cause, if any, and there has been no showing by the defendant National Lead Company that no adequate alternate method exists of making proof of this defendant's physical and mental condition or that examinations at this time will shed light upon this defendant's condition at the time of the accident more than a year ago.

In opposition to the particular examinations and the times thereof, objection is further made that in any event the defendant Robert L. Schlagenhauf could not appear for the examination schedule by Dr. Leo Loughlin for Sep-

tember 24, 1963 for the reason that the presence of this defendant is required in the City of Philadelphia, State of Pennsylvania, during all of the week beginning September 23, 1963 to participate actively in the defense of actions entitled Norma Pauline, Joseph Pauline, Frederick Pauline, and *Catherine Pauline v. The Greyhound Corporation* which are pending in the Court of Common Pleas in the said City and State, the trial of which commences on the 23d day of September, 1963 and which arise out of the same collision involved herein; and additional objection is made to examination by Dr. Karl L. Manders, a neurologist, for the reason that the said Dr. Manders has testified and is to testify for plaintiffs in many cases being defended by this defendant's attorneys and is verily believed to be prejudiced toward the said attorneys and therefore toward this defendant to the extent that this defendant could not receive a fair and impartial examination and report thereof by the said Dr. Manders.

The defendant Robert L. Schlagenhauf respectfully prays that the petition of defendant National Lead Company be denied and that any and all prior orders for the physical and mental examination of this defendant be set aside.

Respectfully submitted,

Smith & Yarling,

By Richard W. Yarling,
1313 First Federal Bldg.,
Indianapolis, Indiana

Attorneys for Defendant

Robert L. Schlagenhauf.

VERIFICATION

Richard W. Yarling, being first duly sworn, deposes and says that he has read the foregoing Objections and Brief and that the statements of fact contained therein are true.

/s/ Richard W. Yarling

Richard W. Yarling

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, the undersigned, a Notary Public, in and for said county and state this 18th day of September, 1963.

Donald K. Tunnell
Notary Public.

My commission expires 6-26-65

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the defendant Robert L. Schlagenhauf, certifies that copies of the foregoing Brief were forwarded by first class U. S. Mail, postage prepaid, on the 18th day of September, 1963, to Rocap, Rocap, Reese & Robb, 156 E. Market Street, Indianapolis, Indiana, attorneys for defendant National Lead Company; Townsend & Townsend, 403 Indiana Building, Indianapolis, Indiana, attorneys for plaintiffs; Armstrong, Gause, Hudson & Kightlinger, Fidelity Building, Indianapolis, Indiana, attorneys for defendant Contract Carriers, Inc. and Joseph L. McCorkhill; and to Locke, Reynolds,

Boyd & Weisell, Consolidated Building, Indianapolis, Indiana, attorneys for cross-defendant General Motors Corporation.

Richard W. Yarling
Attorney.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants.

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

No. IP 62-C-285

ORDER

The Defendant, National Lead Company, has filed its Petition To Amend Court Order and To Order Defendant, Robert L. Schlagenhauf, Examined Physically, which petition is in the words and figures as follows:

(H.I.)

The Court hereby grants said petition and vacates its or-

der requiring Robert L. Schlagenhauf to be examined by nine (9) physicians, said order being dated March 15, 1963 and the Court having read and examined said petition and being duly informed and advised in the premises now grants said petition.

The Court now orders the defendant, Robert L. Schlagenhauf, to be examined by the following four (4) physicians on the dates and times indicated:

Dr. L. Leo Loughlin, M.D. 10:00 A.M. 9/24/63	Dr. A. Ebner Blatt 3:30 P.M. 9/20/63
Dr. Karl L. Manders, M.D. 8:30 A.M. 10/7/63	Dr. Jack I. Tabue 11:00 A.M. 10/10/63

Cale J. Holder
Judge, United States District Court

DATED this Sept. 18, 1963
day of September, 1963

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana,
Respondent.

Stay Order

Upon consideration of the emergency motion for stay of proceedings and/or stay of enforcement of any and all orders of the respondent requiring the physical and mental examination of petitioner, as filed by the petitioner herein, to enable said petitioner to seek review of this Court's decision of July 23, 1963, by way of petition for writ of certiorari to the Supreme Court of the United States, and it appearing that good cause theretor exists, it is

ORDERED, that the proceedings in consolidated causes No. IP 62-C-285 and IP 62-C-308 as docketed in the United States District Court for the Southern District of Indiana shall be and hereby are stayed, including the enforcement of any and all orders of said respondent requiring petitioner to submit to physical and mental examination pending the filing and disposition of petitioner's petition for writ of certiorari to the Supreme Court of the United States for review of this Court's decision of July 23, 1963 herein.

DATED September 24, 1963.

/s/ Luther M. Swygert
Circuit Judge

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 569

ROBERT L. SCHLAGENHAUF,
Petitioner,

v.

CALE J. HOLDER, United States Judge for the Southern District of Indiana,
Respondent.

ENTRY

Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent, hereby directs the Clerk of the United States District Court for the Southern District of Indiana to properly certify to the Supreme Court of the United States as the following portions of the record involving pertinent matters occurring in his court subsequent to the decision of the United States Court of Appeals for the Seventh Circuit and prior to the filing of the petition for a writ of certiorari herein, which proceedings occurred in a cause entitled and numbered: "John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz and Jennie Markiewicz, in their own right, Plaintiff v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill, and Contract Carriers, Inc., Defendants, and National Lead Company, Third Party Defendant," No. IP 62-C-285, to-wit:

Petition to Amend Court Order and to Order Defendant, Robert L. Schlagenhauf, Examined Physically, filed September 16, 1963;

Objections and Brief of Defendant Robert L. Schlagenhauf in Opposition to Petition to Order Physical and Mental Examinations, filed September 18, 1963;

Order entered by the Court ordering the physical examinations, dated September 18, 1963;

Order of the United States Court of Appeals for the Seventh Circuit entered September 24, 1963, staying proceedings.

Said portions of the record, after having been so certified, shall be delivered to the attorneys of record for the Respondent and shall be filed by them in the Supreme Court of the United States as its rules provide, a certified copy of this Entry to be attached.

DATED this 25 day of October, 1963.

Cale J. Holder
Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, in their own right,	
v.	
THE GREYHOUND CORPORATION ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, *Third Party Defendant.*	No. IP 62-C-285

CLERK'S CERTIFICATE

I, Robert G. Newbold, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the foregoing is a true transcript of copies of proceedings and pleadings had and filed in the above cause, as listed and designated in the Index of this transcript.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Court at Indianapolis, Indiana, this 25 day of October, 1963.

Robert G. Newbold, *Clerk*
United States District Court
Southern District of Indiana

By: Arthur J. Beck
Deputy Clerk